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No. 91-379

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In The  
**Supreme Court of the United States**  
October Term, 1991

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AMERICAN ECONOMY INSURANCE  
COMPANY, et al.,

*Petitioners,*

v.

BEVERLY L. SMITH, et al.,

*Respondents.*

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Petition For A Writ Of Certiorari To The  
Court Of Appeals For  
The Second District Of Texas

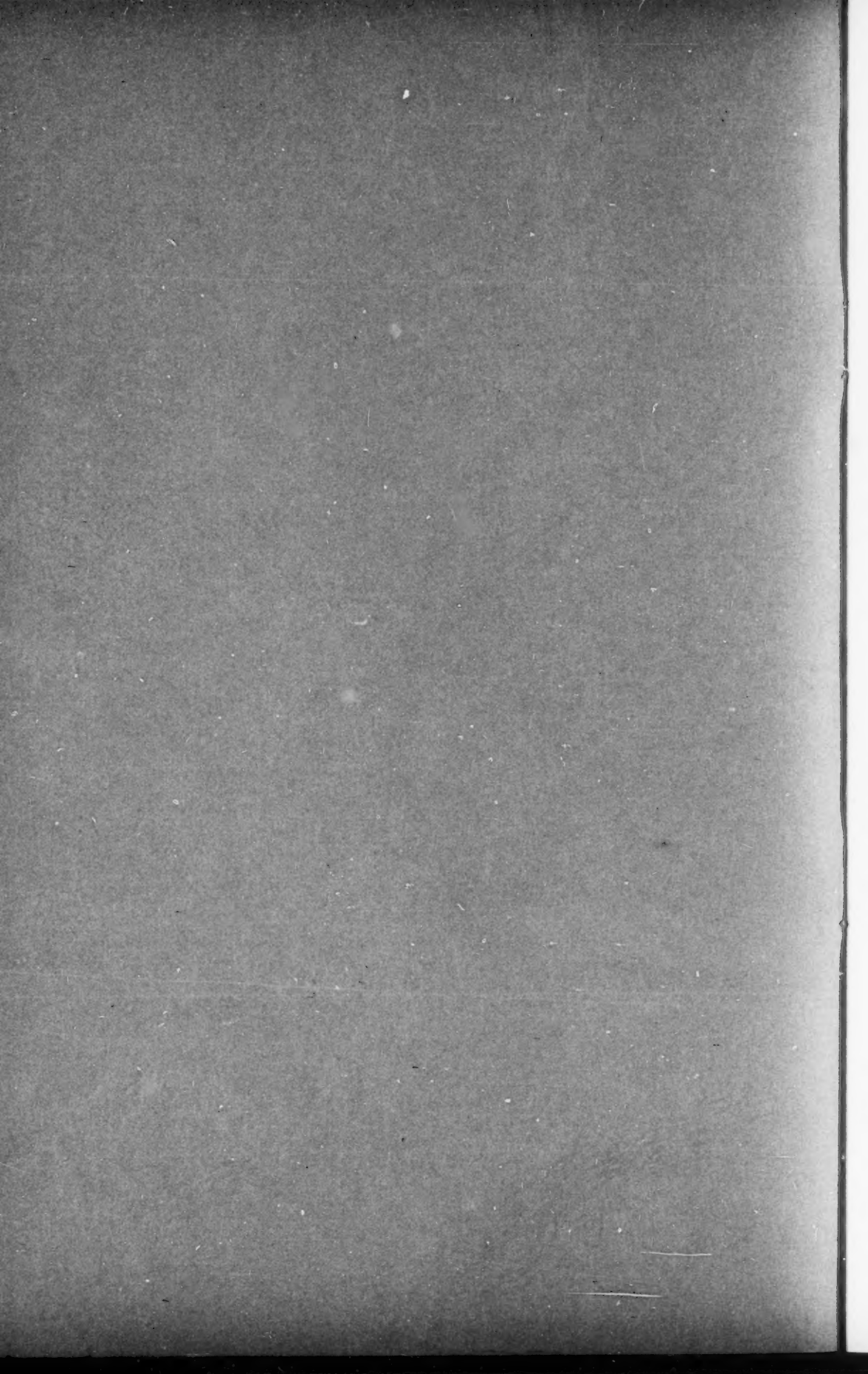
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RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED (RESTATED)

An exception to ERISA coverage exists for employee benefit plans "maintained solely for the purpose of complying with applicable workman's compensation laws." 29 U.S.C. § 1003(b)(3).

The questions (restated) presented in this petition are:

1) Does this ERISA exception apply to a policy of Workers' Compensation obtained by an employer in compliance with applicable state law which penalizes non-conforming employers by withdrawal of common law defenses in direct negligence actions by injured employees not covered by such insurance?

2) Does this exception apply to a policy of Workers' Compensation insurance which complies solely with applicable state workers' compensation laws and administrative procedures under which benefits are administered by a separate administrative unit?

## LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the petitioner American Economy Insurance Company, the petitioner Lindsey & Newsom Claim Services, Inc. (formerly known as Lindsey & Newsom Insurance Adjusters, Inc.), and the respondents Beverly L. Smith and William Smith.

Petitioners have identified the parent company of the petitioners as follows:

The parent company of American Economy Insurance Company is American States Insurance Company, whose parent company is Lincoln National Corporation. American Economy Insurance Company has no non-wholly-owned subsidiaries.

The parent company of Lindsey & Newsom Claim Services, Inc., is Morden & Helwig Group, Inc.; Lindsey & Newsom Claim Services, Inc., has no non-wholly-owned subsidiaries.

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**RESPONDENTS' BRIEF IN OPPOSITION**

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The Respondents, Beverly L. Smith and William Smith, respectfully pray that Petitioners' petition for a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Second District of Texas, be in all things denied.

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**OPINIONS BELOW**

The opinion of the Court of Appeals for the Second District of Texas is reported at 794 S.W.2d 574.

The Supreme Court of Texas denied discretionary review without opinion.

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### JURISDICTION

The opinion and judgment of the Court of Appeals were entered on August 1, 1990. Timely motions for rehearing of that decision were overruled on September 11, 1990.

Timely applications to the Supreme Court of Texas for a writ of error were denied on March 27, 1991. A timely motion for rehearing of that decision was overruled on June 5, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

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### STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1003(b) states in pertinent part:

The provisions of this subchapter shall not apply to any employee benefit plan if -

\* \* \*

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws; . . .

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### STATEMENT OF THE CASE

This is a suit by Respondents Beverly Smith ("Smith") and her husband William Smith arising out of a workers' compensation claim filed by Smith in 1984. Petitioners are the American Economy Insurance Company ("American Economy"), which is a workers' compensation carrier, and Lindsey & Newsom Insurance Adjusters, Inc. ("Lindsey & Newsom"), which is American Economy's adjuster.

At the time of her injuries, Beverly Smith was employed by Braum's Ice Cream Stores, Inc. ("Braum's") in Tarrant County, Texas. Braum's was then insured under a workers' compensation program that was totally separate and apart from any other insurance coverage provided by Braum's to its employees. Moreover, Braum's workers' compensation plan was administered under totally separate and independent procedures from any other employee benefits plan provided by Braum's. (R. 20, 22, 23).

After sustaining her injury, Smith sought medical treatment from an orthopedic doctor, but she was refused medical care because Petitioners refused to accept financial responsibility for her treatment. Petitioners instead directed Smith to report to three different doctors, who rendered opinions on her condition.

In reliance on the medical records and reports of these three doctors, Smith settled her claim. This settlement was approved by the Texas Industrial Accident Board in accordance with the Texas Workers' Compensation Act and the administrative procedures established by the Texas Industrial Accident Board. (R. 24, 38).

Subsequently, Smith learned that her injury was more severe than the mild back strain as diagnosed by Petitioners' doctors. Smith's physicians performed further diagnostic tests and discovered that she suffered from a herniated, intervertebral disk. She underwent surgery for the removal of the disk and was left with a permanent partial disability and future medical expenses.

Smith then filed suit to set aside her prior settlement and to reopen her claim before the Texas Industrial Accident Board. In addition, Smith sued Petitioners for damages on the basis of misrepresentation by Petitioners' agents, Smith's detrimental reliance on Petitioners' doctors' reports, and Petitioners' breach of the duty of good faith and fair dealing. (R. 19-38).

American Economy and Lindsey & Newsom moved for summary judgment on the ground, *inter alia*, that the Smiths' damage claims were preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"); (R. 46-121, 308-13). The trial court granted summary judgment to both defendants. (R. 368, 369).

The Texas Court of Appeals reversed the summary judgment and remanded the case for trial. The Court of Appeals held that Braum's workers' compensation plan was maintained *solely* for the purpose of complying with Texas' workers' compensation law. Thus, under 29 U.S.C. § 1003(b)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), the Court of Appeals found that Smith's claims were not preempted by ERISA federal laws. The Court of Appeals rejected Petitioners arguments that the plan was intricately embedded with

Braum's other insurance and employee benefits. Pet. A-1-8.

The Supreme Court of Texas denied discretionary review of this decision. (P. A-13, *infra*).

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## HOW THE FEDERAL QUESTIONS WERE PRESENTED

Respondents acknowledge that Petitioners sought to raise the federal questions presented herein as stated in their petition.

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## REASONS FOR DENYING THE WRIT

This case presents a fact question as to whether the workers' compensation policy as written by American Employers and administered by the Texas Industrial Accident Board is a plan "maintained solely for the purpose of complying with applicable workmens' compensation laws . . ." and thus exempt from ERISA coverage pursuant to 29 U.S.C. § 1003(b)(3).

Petitioners concede that " . . . state courts undoubtedly have full jurisdiction to adjudicate federal law issues," e.g. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478-79 (1981); Petitioners' Brief, p. 10. Here the state court, fully recognizing the ERISA preemptions and regulations applicable to employee benefit plans, made a factual determination that American Economy's policy of insurance in question fell squarely within the ERISA exemption. 29 U.S.C. § 1003(b)(3).

**I. A SEPARATE POLICY OF INSURANCE WHICH PROVIDES ONLY WORKERS' COMPENSATION BENEFITS REQUIRED BY STATE LAW AND ADMINISTERED AS A SEPARATE UNIT IS EXEMPT FROM ERISA PREEMPTION.**

In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), this Court established a two-fold test to determine whether a plan is "maintained solely for a purpose of complying with applicable workmen's compensation laws" under 29 U.S.C. 1003(b)(3). The test is whether, in practice, the plan is administered as a separate administrative unit and whether it provides only those benefits required by state law. *Shaw*, 463 U.S. at 107.

Texas created a statutory administrative body, the Industrial Accident Board, now known as the Texas Workers' Compensation Commission. Tex. Rev. Civ. Stat. Art. 8307 § 1. This administrative body was empowered to create rules to carry out the provisions of the workers' compensation benefit program in Texas. Texas Register, Rules of the Industrial Accident Board Workers Compensation. These administrative rules, together with the statutory provisions of the Texas Workers' Compensation Act (Tex. Rev. Civ. Stat. arts. 8306-8309-1), provide a complete administrative plan for the workers' compensation program in Texas.

Under this statute, employers in Texas are not required to subscribe to workers' compensation insurance (Tex. Rev. Civ. Stat. art. 8306). However, once the employer elects to provide workers' compensation coverage, the employer then is required to accept the rights and responsibilities imposed by the statute.

Upon subscription, the employer *must* obtain insurance coverage through a licensed insurance company or through self-insurance. Texas has provided comprehensive guidelines and requirements that mandate what medical benefits and disability benefits must be provided by the employer through its insurance carrier to qualify as workers' compensation coverage. Tex. Rev. Civ. Stat. Art. 8306. The employer is *not free* to establish his own plan to compensate employees who suffer from occupational injuries. Only by providing those benefits *required* by the Texas workers' compensation statute and by submitting to administration of such benefits by the appropriate state agency can the employer avoid penalties set by the workers' compensation statute.

The insurer for an employee who subscribes to the Act becomes *absolutely liable* to pay workers' compensation benefits when an employee is injured in the course and scope of his employment. Tex. Rev. Civ. Stat. art. 8306 § 3a. However, the employer's liability is limited. In return, the employee of subscribers lose their right to sue their employer under the common law or under statute, unless the employee *timely* notifies the employer that he declines the workers' compensation coverage.

If the employer chooses *not* to subscribe, however, the injured employee may sue for common law and statutory damages. In addition, the non-subscribing employer loses all common law defenses in the law suit against it by an injured employee. In addition, the employer faces unlimited liability. Tex. Rev. Civ. Stat. art. 8306, § 1, 4. Thus the benefit and importance of obtaining coverage under the state workers' compensation law is obvious.

Moreover, a non-subscribing employer *must* notify the Commission that he is declining to subscribe *in the manner and time prescribed* by Commission rules. Otherwise, his failure to notify the Commission subjects the employer to a monetary penalty for each day of noncompliance. Tex. Rev. Civ. Stat. art. 8306 § 3.22. Thus, although the employer may opt out of Texas workers' compensation program, the employer is *still bound* by the workers' compensation law in important respects. The decision to subscribe or not to subscribe is not wholly "free," and "voluntary," or "strictly elective," as Petitioners would have this Court believe.

In this case, Braum's elected to provide workers' compensation coverage under Texas' workers' compensation statute. Braum's activities with respect to its workers' compensation coverage was governed *exclusively* by the Industrial Accident Board. The rules of administration of the workers' compensation plan was governed by the Industrial Accident Board with penalties for non-compliance imposed and determined by the Industrial Accident Board.

Moreover, Braum's procured a policy of workers' compensation insurance from American Economy which by its very terms complied with those terms required by the Texas Workers' Compensation Act. American Economy, as the employer's insurer for workers compensation carrier, is also governed by rules of the Industrial Accident Board.

**II. THOSE PLANS LIMITED TO WORKMENS' COMPENSATION BENEFITS, UNEMPLOYMENT COMPENSATION BENEFITS AND DISABILITY BENEFITS SPECIFIED BY WORKERS' COMPENSATION LAW, WHICH DO NOT IMPINGE UPON THE ADMINISTRATION OF OTHER CO-EXISTING EMPLOYEE BENEFIT PLANS PROVIDED BY AND ADMINISTERED BY THE EMPLOYER, QUALIFY FOR EXEMPTION FROM ERISA PRE-EMPTION.**

The presence of exclusionary clause 29 U.S.C. 1003(b) (3) in the ERISA statute bespeaks the intent of the framers of the statute to exclude workers' compensation programs which do not impact upon other aspects of 'employer benefit plans' or their administration. In *Alessi v. Raybestos - Manhattan, Inc.*, 451 U.S. 504 (1981), this Court upheld the preemption by federal law in New Jersey's workers' compensation statute only insofar as it impacted upon pension benefits governed by ERISA. *Allessi*, 451 U.S. at 506. However, this Court did *not* mandate preemption of the *whole* New Jersey workers' compensation statute.

The purpose of ERISA preemption is to provide uniform regulation and administration by employers of employee benefit plans. *Ft. Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 11 (1987):

Congress intended preemption to afford employers advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however, with respect to *benefits whose provisions by nature require an ongoing administrative program to meet the employer's obligation*. It is for

this reason that Congress pre-empted state laws relating to *plans* rather than simply to benefits.

*Id.* at 11 (emphasis added).

Where a state, by law, has established required benefits for workmens' compensation plans, unemployment or disability insurance benefits and where such programs are not administered by the *employer* as part of his total employee benefit plan, but as a separate administrative unit, the ERISA exemption applies. 29 U.S.C. § 1003(b)(3). *Accord Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983):

Only separately administered disability plans maintained solely to comply with the Disability Benefit Law are exempt from ERISA coverage under § 4(b)(3).

*Id.*

As a Braum's employee, Smith was eligible to participate in Braum's employee benefit plan (R 49-50). That plan provided a group life and accidental death and dismemberment insurance policy issued by a company *other than* American Economy and a group accident, medical and non-occupational disability benefit program that was self-insured. (R 53-121, 130-98). There was no interconnection between the workers' compensation plan and other benefits provided through other programs offered by Braum's as part of its employee benefit plan.

American Economy's policy serves no other purpose than to comply with the Texas Workers' Compensation Act. ERISA expressly does not apply to plans that have as their entire purpose compliance with state law. In this case, the *entire* policy at issue was a workers' compensation plan that was required to be in place strictly

pursuant to Texas' workers' compensation law to which Braum's elected to subscribe. The entire plan was regulated by the workers' compensation statute. Braum's workers' compensation policy did not contain a single benefit not required by Texas' workers' compensation law. Therefore, ERISA does not preempt the legal issues considered in this case.

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### CONCLUSION

For the reasons stated herein, the writ of certiorari should be denied in this case.

Respectfully submitted,

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